

# SUPREME COURT OF THE UNITED STATES

No. 95-8836

ELLIS WAYNE FELKER, PETITIONER *v.*  
TONY TURPIN, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE ELEVENTH CIRCUIT AND ON  
PETITION FOR A WRIT OF HABEAS CORPUS

[June 28, 1996]

JUSTICE SOUTER, with whom JUSTICE STEVENS and  
JUSTICE BREYER join, concurring.

I join the Court's opinion. The Court holds today that the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1217, precludes our review, by "certiorari" or by "appeal," over the Courts of Appeals's "gatekeeper" determinations. See provision to be codified at 28 U. S. C. §2244(b)(3)(E). The statute's text does not necessarily foreclose all of our appellate jurisdiction, see, e.g., 28 U. S. C. §§1254(2) (certified questions from courts of appeals); §1651(a) (authority to issue appropriate writs in aid of another exercise of appellate jurisdiction); this Court's Rule 20.3 (procedure for petitions for extraordinary writs), nor has Congress repealed our authority to entertain original petitions for writs of habeas corpus.<sup>1</sup> Because petitioner sought only a writ of certiorari (which Congress has foreclosed) and a writ of habeas corpus (which, even applying the

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<sup>1</sup>Such a petition is commonly understood to be "original" in the sense of being filed in the first instance in this Court, but nonetheless for constitutional purposes an exercise of this Court's appellate (rather than original) jurisdiction. See Oaks, The "Original" Writ of Habeas Corpus in the Supreme Court, 1962 S. Ct. Rev. 153.

traditional criteria, we would choose to deny, see *ante*, at 12), I have no difficulty with the conclusion that the statute is not on its face, or as applied here, unconstitutional. I write only to add that if it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open.<sup>2</sup> The question could arise if the Courts of Appeals adopted divergent interpretations of the gatekeeper standard.

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<sup>2</sup>See e.g., Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1364–1365 (1953) (articulating "essential functions" limitation on the Exceptions Clause); Ratner, Congressional Power Over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157, 160–167 (1960) (same); Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 Stan. L. Rev. 895, 896–899 (1984) (taking a broad view of Congress's authority, but noting ongoing scholarly debate); Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 781, 828–837 (1994) (noting that the "essential functions" argument may find textual support, with respect to the lower federal courts, in the requirement of Art. I, §8, cl. 9, that such courts be "inferior to the supreme Court").